Supreme Court, U.S.
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THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

OCTOBER TERM 1998

Rainsong Company,
Petitioner,

v.

Federal Energy Regulatory Commission and
U.S. Department of Agriculture,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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I. Question Presented:

May a federal agency, whose licensing decisions are subject to a 60-day statutory appeal period, shorten an applicant's time for filing a petition for review by failing to serve the decision upon the applicant on or prior to the date of filing, in violation of its own rules?

II. Parties to the Proceeding Below

The parties to the proceeding below were Rainsong Company, the Federal Energy Regulatory Commission, and the United States Department of Agriculture. Rainsong Company is a sole proprietorship owned by William L. Devine.

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V. Citations of Opinions and Orders Below

The Opinion of August 19, 1998 is published at 151 F.3d 1231. The Order Denying Rehearing is unpublished. The decision of the Federal Energy Regulatory Commission of which review was sought is published at 79 FERC ¶61,338.

VI. Basis for Jurisdiction

The judgment was entered by the Court of Appeals for the Ninth Circuit on August 19, 1998. Petitioner filed a motion for rehearing, which was denied on December 2,

1998. This Court has jurisdiction to review the ruling of the Court of appeals by writ of certiorari under 28 U.S.C. §1254(1).

VII. Statutes and Regulations Involved

The statutes and regulations involved are set out in full in the appendix. These are:

5 U.S.C. §555(e)
16 U.S.C. §825h
16 U.S.C. §825l
18 CFR §385.2007
18 CFR §385.2010

VIII. Statement of the Case

This matter arises from a licensing proceeding which has been pending since 1982 before the Federal Energy Regulatory Commission, in which the petitioner, Rainsong Co., sought a license for the construction and operation of a small hydroelectric generation plant on Lena Creek in the Olympic National Forest in Washington State. Petitioner's license application was denied by the Federal Energy Regulatory Commission on May 5, 1993; this decision was reversed by the Ninth Circuit Court of Appeals in Rainsong v. FERC, 78 F.3d 1435 (9th Cir. 1996); rehearing was granted and that opinion was withdrawn and replaced by Rainsong v. FERC, 106 F.3d 269 (9th Cir. 1997), whereupon FERC again summarily dismissed petitioner's license application on March 28, 1997. Petitioner filed a timely motion for rehearing, as required by 16 U.S.C. §825l, before seeking judicial review of the denial.

FERC denied the petition for rehearing in an order bearing the notation, "issued June 13, 1997." The decision was not mailed to the petitioner, however, until June 18,

1997, and FERC's rules mandated service of all documents upon the parties on or prior to the date of filing, 18 CFR §385.2010. On August [illegible] 997, 58 days after the service of the decision and 63 days after the date written on the decision, petitioner filed a petition for review with the U.S. Court of Appeals for the Ninth Circuit. The Court dismissed the appeal for lack of jurisdiction, finding that the petition for review was not timely filed because time under 16 U.S.C. §825l had run not, as petitioner had argued, from the service date of June 18, 1997 but from June 13, 1997 when a copy of the decision had been posted on a bulletin board in FERC's office in Washington, D.C.

The Court of Appeals had jurisdiction over this matter under 16 U.S.C. §825l.

IX. Argument

The Court should grant Certiorari in this matter because the Court of Appeals, in ruling that time commences to run against an applicant in a licensing proceeding regardless of whether FERC conforms to its rules mandating service of the decision at the time of filing, has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. This is so because the effect of the decision of the Court of Appeals is to completely liberate FERC from any obligation to serve its decisions upon applicants at all, opening the door to agency abuse and manifest injustice to parties in proceedings before FERC and before other agencies with similar rules.

An applicant who is denied a license under the Federal Power Act is entitled to appeal the decision of FERC "within sixty days after the final order of FERC upon application for rehearing...," 16 U.S.C. §825l. The statute is

silent as to the specific act which will trigger the running of time, but the Court of Appeals concluded that a FERC regulation, 18 CFR §385.2007, which determines when an order of the Commission is "deemed issued" and therefore becomes "effective," also determines the date upon which time commences to run for judicial review under 16 U.S.C. §825l. Under 18 CFR §385.2007, FERC's order denying rehearing was "effective" on June 13, when a copy of the decision was posted on a bulletin board in FERC's Public Information office in Washington, D.C.

FERC's rules unambiguously require that a decision be served upon the parties "not later than the date of filing," 18 CFR §385.2010(g)(2), and that such service be made by the Secretary of the Commission, 18 CFR §385.2010(b)(3). As of June 13, 1997, when the decision in this case is dated, no such service had been made and accordingly, the decision could not be deemed to have been properly filed until such service was made on June 18, 1997. As petitioner contended before the Court of Appeals, FERC's failure to properly serve the decision made any purported "filing" prior to service null and void, so that the period for filing a petition for review could not run from that date. The Court of Appeals rejected this argument, holding that it would render portions of 18 CFR §385.2007 "surplusage" because the commencement of time for judicial review would always run from the date of service and not from the other dates (posting and publication) specified in that section.

The consequence of the Court of Appeals' ruling for an applicant for a license is that, although FERC is obligated by its own rules and by the Administrative Procedure Act, 5 U.S.C. §555(e), to serve notice of its decisions, and although applicants routinely rely upon FERC to follow its own rules governing service before filing, an applicant's "right" to be

served is utterly unenforceable. FERC may serve the decision a day late, five days late, or a year late, but so long as it posts a copy of the decision on a bulletin board in Washington, it has done everything it must do to commence the running of time for judicial review. FERC may effectively shorten the statutory time for an applicant to retain counsel and commence proceedings, as here, or entirely eliminate that time through late service; and because the statutory time limitation is jurisdictional, the applicant is left in the cold. Such a result is contrary to the import of FERC's own rules, APA, and the Due Process clause.

Of course, where jurisdictional requirements are involved, harsh results sometimes are inevitable. This harsh result, however, which in the instant case terminated an application which the petitioner had pursued with the agency for approximately seventeen years, is not justified by the statutory or regulatory language, and should be rejected as contrary to public policy.

The Court of Appeals, in reaching its ruling, rested upon two incorrect premises. First, the Court assumed that FERC had been authorized by statute to set the date upon which time for judicial review of its orders would run. Second, the Court assumed that the date upon which an order of the Commission becomes "effective" must be the same as the date upon which time for judicial review begins to run.

FERC is not authorized by the statute to set the date upon which time commences to run for judicial review of its orders. Rather, the statute upon which the Court of Appeals relied, 16 U.S.C. §825h, provides that "[o]rders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe." 18 CFR §385.2007, upon which the Court of Appeals relied, purports to do nothing more than that: set the date upon which Commission

orders are "deemed issued," §385.2007(b)(1), and therefore become "effective," §385.2007(c)(1). Nothing in the regulations purports to set the date upon which time for judicial review under 16 U.S.C. §825l commences.

The Court of Appeals incorrectly assumes that the date an order becomes "effective" must also be the date upon which time for judicial review begins to run. The Supreme Court has ruled directly to the contrary in Hill v. Hawes, 320 U.S. 520, at 523, 64 S.Ct. 334, 88 L.Ed. 283 (1944), finding there in regard to a now-obsolete provision of Federal Rule of Civil Procedure 77(d):

> "It may well be that the effect to be given the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule."

Under the same reasoning as applied in Hill v. Hawes, the Court of Appeals here should have ruled that although FERC's decision may have been "effective" for other purposes, in accordance with the terms of 18 CFR §385.2007, once it had been posted on FERC's Washington, D.C. bulletin board, it did not start the running of the appeal period until notice had been sent, and the decision thereby properly "filed" under 18 CFR §385.2010, on June 18. The petition for review in this matter was then timely filed on August 15.

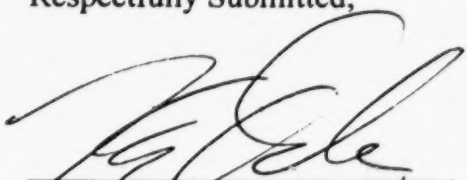
That the date upon which the time for filing a petition for review begins to run should be tied to actual notice to the parties, rather than to posting of a copy of a decision on a bulletin board three thousand miles from the applicant's place of business, makes good sense as a matter of public policy. In the absence of specific contrary guidance, federal courts

have generally computed statutory appeal periods from the time notice was given, rather than upon some other event, see, e.g., Cities of Batavia, Napierville, etc. v. FERC, 672 F.2d 64, 72 n. 14 (D.C.Cir. 1982) (Judicial review of FERC decision ran from date of service); B.J. McAdams, Inc. v. ICC, 551 F.2d 1112, 1115 (8th Cir. 1977) (Time for judicial review of ICC decision runs from receipt of notice of order); Energy Probe v. NRC, 872 F.2d 436, 437 (D.C. Cir. 1989) (Time for judicial review of NRC decision runs from date of service). Such an approach is also consistent with the principles of due process, under which government is obligated to give notice in a manner reasonably calculated to give actual, not merely constructive, notice.

X. Conclusion

In sanctioning FERC's violation of its own rules governing service, and allowing FERC to benefit from that violation, the Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power by way of the Writ of Certiorari. For all of the reasons set forth herein, petitioner, Rainsong Company, respectfully requests that this Honorable Court grant this Petition..

Respectfully Submitted,



Kurt Denke
Counsel for Petitioner

APPENDIX

I. Opinion of the Court of Appeals

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAINSONG COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

U.S. DEPARTMENT OF AGRICULTURE,
Respondent-Intervenor.

No. 97-70914

Proj. No. 6287-009

OPINION

Appeal from the Federal Energy Regulatory Commission

Argued and Submitted
June 8, 1998--San Francisco, California

Filed August 19, 1998

Before: Alfred T. Goodwin, Joseph T. Sneed, and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Goodwin

COUNSEL

Kurt Denke, Seattle, Washington, for the petitioner.

Timm L. Abendroth, Federal Energy Regulatory Commission, Washington, D.C., for the respondent.

Jared A. Goldstein, United States Department of Justice, Washington, D.C., for the respondent-intervenor.

GOODWIN, Circuit Judge:

Rainsong Company appeals the Federal Energy Regulatory Commission's (the "Commission") denial of its application for a license to build a hydroelectric dam. Rainsong contends that the Commission directly contravened this court's instructions upon remand and asks this court either to grant its license or remand the application for an evidentiary hearing before a special master. We dismiss the appeal for lack of jurisdiction as the notice of appeal was not timely.

Facts and Procedural Background

This is the second time that Rainsong has appealed an adverse decision by the Commission to this court. The underlying facts of this case can be found in our opinion

Rainsong Co. v. FERC, 106 F.3d 269, 271-72 (9th Cir. 1997).

On the first appeal, we reversed and remanded the matter to the Commission. We held that "[t]he Commission's presumptive reliance on the Forest Services's 1990 Plan to determine the purpose for which Olympic National Forest was created or acquired constitutes and impermissible interpretation of its statutory mandate." Id. at 275 (internal quotations omitted).

We found that "'Congress intended national forests to be reserved for only two purposes--to conserve the water flows, and to furnish a continuous supply of timber for the people.'" *Rainsong*, 106 F.3d at 275 (quoting *United States v. New Mexico*, 438 U.S. 696, 707-08 (1978)). " National forests were not to be reserved for esthetic, environmental, recreational, or wildlife preservation purposes.' " Id. (quoting *New Mexico*, 438 U.S. at 708).

On remand, the Commission again denied Rainsong's application. Rainsong petitioned for rehearing, which the Commission denied in an order dated June 13, 1997. [1] Rainsong filed its notice of appeal on August 15, 1997, 63 days after the order denying its petition for rehearing.

Discussion

For this court to have jurisdiction, a party must file its notice of appeal within 60 days "after the order of the Commission." 16 U.S.C. §825l(b); *Sierra Assoc. for Environment v. FERC*, 791 F.2d 1403, 1406 (9th Cir. 1986). Under Federal Rule of Appellate Procedure 26(b), this court may not "enlarge the

time prescribed by law for filing . . . a notice of appeal from, an order of an administrative agency. . . except as specifically authorized by law."

In this case, Rainsong filed its notice of appeal 63 days after the Commission posted a full-text copy with the Division of Public Information, but within 60 days of the time that the Commission mailed the order to Rainsong. Thus, whether this court has jurisdiction turns on whether "after the order of the Commission" refers to the date the order was posted or the date the order was mailed to Rainsong.

The Commission argues that "after the order of the Commission" refers to the date when the order is issued. Its regulations provide that an order is:

> deemed issued when the Secretary does the earliest of the following:
>
> (i)Posts a full-text in the Division of Public Information;
>
> (ii)Mails or delivery copies of the order to the parties; or
>
> (iii)Makes such copies public.

18 C.F.R. 385.2007(b). See also 18 C.F.R. §385.2007(c)(Orders are effective on date issued.). Under the Commission's interpretation of "date issued", we lack jurisdiction.

We agree with the Commission's reading for two reasons. First, Congress has explicitly provided that"[o]rders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe." 16 U.S.C. § 825h. Second, the regulation is directly on point. The regulation specifically deals with the date that an order is issued, so it naturally follows to use this regulation to determine the meaning of "after the order of the Commission."

Rainsong argues that the time should not begin to run before the Commission mailed notification because the Commission failed to comply with 18 C.F.R. §385.2010, which provides that documents must be served upon the parties "not later than the filing of the document." As the Commission did not mail the order until June 18, Rainsong claims that the order could not be filed any earlier than June 18, and accordingly the notice of appeal was timely.

Rainsong's argument fails for three reasons. First, relevant caselaw has directly rejected Rainsong's argument. In *National Black Media Coalition v. FCC*, 760 F.2d 1297, 1299 (D.C. Cir. 1985), the appellants argued that "they reasonably relied on the [Federal Communications] Commission to provide the legally required notification, and that the otherwise applicable deadline must therefore be extended lest the Commission profit from its own violation of the law." The FCC claimed, however, that the time started when it had made a full text copy of the decision available to the press and public in the Commission's Information Office. See id. at 1299 n.2. Then-Judge Scalia rejected the appellant's argument, writing that the "appellants are asking us to create for ourselves otherwise nonexistent jurisdiction,

in a fashion that cannot be grounded in the statutory text." Id. at 1299.[2]

The logic of *National Black Media* can be found in other contexts. For example, the Tenth Circuit followed the D.C. Circuit in *Mesa Airlines v. United States*, 951 F.2d 1186, 1188-89 (10th Cir. 1991). In this case, the appellant filed his notice of appeal 63 days after an Administrative Law Judge signed and dated his order. Focusing on public notice, the Tenth Circuit stated that "[w]e do not believe that service of the order . . . is relevant to our calculation." Id. at 1188.

Second, were this court to follow Rainsong's interpretation of "after the order of the Commission," two-thirds of 18 C.F.R. § 385.2007 would be rendered surplusage. Section 385.2007 states that an order is issued on the earliest of three events, one of which is service upon the parties. If this court rules that service is a prerequisite for the time period to begin, then the other two events contemplated by § 385.2007--posting copies in the Division of Public Information or making copies public--become irrelevant. "Of course, in the construction of administrative regulations, as well as statutes, it is presumed that every phrase serves a legitimate purpose and, therefore, constructions which render regulatory provisions superfluous are to be avoided." *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976).

Third, it is not clear that the regulation Rainsong relies upon is relevant. Section 385.2010 deals simply with service. Nothing in the regulation indicates that it affects when an order is deemed effective or issued.

Rainsong points to caselaw that states that the time period for notice of appeal does not commence until service is initiated, but such cases do not apply here. See *City of Batavia v. FERC*, 672 F.2d 64, 72 n.14 (D.C. Cir. 1982)(Issue date when order placed in mail.); *B.J. McAdams, Inc. v. ICC*, 551 F.2d 1112, 1115 (8th Cir. 1977) ("[T]he time period for filing the petition for review began to run on the date McAdams received notice of the order.").

These cases do not apply because they did not face choosing between service and alternate means of triggering the time period for notice of appeal. In *City of Batavia*, the Commission agreed that service was the trigger but failed to credit a day for a holiday. *City of Batavia*, 672 F.2d at 219-20. In McAdams, the Eighth Circuit had to decide whether the discretionary filing of a petition with the agency restarted the clock. *McAdams*, 551 F.2d 1114-15. Thus, neither of these cases address the issue before us.

We hold that "after the order of the Commission" refers to the date the order is deemed issued. Pursuant to the regulation, which we have been shown no cause to believe was
unreasonably applied in this case, the order was "issued" on June 13. Rainsong's notice of appeal was filed 63 days after the order was issued and is therefore untimely. Accordingly, we do not have jurisdiction of the appeal, and the appeal is DISMISSED.

FOOTNOTES

1. Rainsong questions whether June 13 is the actual date the order was issued. Rainsong's Reply Brief at 25 n.11. The Commission attached an affidavit to its brief from the Secretary stating that the order was issued on June 13, 1997. The Secretary refers to an attached Public Reference Room Log, where the order is listed as Number 42. The Secretary, however, wrote down the number to the right (# 75). This was clearly a simple mistake.

2. *National Black Media* is distinct from this case in that the statute there explicitly tied the time period to public notice. 47 U.S.C. S 402(c). Nevertheless, the case properly stands for the proposition that an agency's failure to comply with regulations requiring service cannot toll or restart the clock. This proposition directly contradicts Rainsong's argument. Rainsong contends that such a ruling "invites agency abuse and could be used systematically to shorten or even eliminate a party's time for seeking judicial review." Rainsong's Reply Brief at 27-28. But no such case is presented here; Rainsong introduced no evidence of abuse. Moreover, as the order said on its face "issued June 13," appellant could calculate that under the regulations the deadline for filing an appeal was August 12. Accordingly, no substantial prejudice resulted from the apparently unintentional delay. We need not address the case where an agency intentionally violates its regulations and notifies a party of its decision so late that the party cannot file a timely notice of appeal. We decide only the case before us, in which service of the order was required Friday June 13, but was not made until Wednesday June 18.

II. Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAINSONG COMPANY, Petitioner, v. FEDERAL ENERGY REGULATORY COMMISSION, Respondent. U.S. DEPARTMENT OF AGRICULTURE, Respondent-Intervenor.	No. 97-70914 Proj. No. 6287-009 ORDER

Filed December 2, 1998

Before: GOODWIN, SNEED, AND KLEINFELD, Circuit Judges.

The petitioner's petition for rehearing is DENIED.

III. Opinion of the Court of Appeals

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAINSONG COMPANY,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

No. 93-71035
Proj. No. 6287-007

ORDER AND OPINION

Appeal from the Federal Energy Regulatory Commission

Argued and Submitted
June 16, 1995--San Francisco, California

Opinion Filed March 19, 1996
Withdrawn February 6, 1997
Filed February 6, 1997

Before: Alfred T. Goodwin, Joseph T. Sneed, and
Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Goodwin

SUMMARY

COUNSEL

Christopher D. Williams, San Andreas, California; William Devine, pro se, Maple Falls, Washington, for the petitioner.

Timm L. Abendroth, Federal Energy Regulatory Commission, Washington, D.C., for the respondent.

ORDER

The opinion filed March 19, 1996, appearing at 78 F.3d 1435 (9th Cir. 1996), is WITHDRAWN.

OPINION

GOODWIN, Circuit Judge:

Rainsong Company, following denial of its petition for rehearing by the Federal Energy Regulatory Commission (the Commission), seeks review of an order rejecting Rainsong's application for a hydropower license on a stream within the Olympic National Forest.

I.

FACTS AND ADMINISTRATIVE HISTORY

Rainsong's efforts to build a hydroelectric power plant (the project) began in 1981. Rainsong applied for a license from the Commission pursuant to the Federal Power Act (FPA), 16 U.S.C. SS 791a et seq. The license application proposed building the project on Lena Creek.

The first application was denied by order of the Director of the Commission's Office of Hydropower Licensing on June 29, 1987. The denial was based on the conclusion of the Secretary of Agriculture, relying on the Forest Service's staff reports, that the project would interfere and be inconsistent with the purpose of the Olympic National Forest.

Rainsong appealed that order, and the Commission granted its appeal on January 25, 1990.1 The order reinstated Rainsong's application and gave Rainsong six months to try to resolve the Forest Service's objections and to amend the license application if needed.2 Rainsong filed an amended application on July 23, 1991. The application proposed construction of a five-megawatt hydroelectric plant. The project would consist of a ten-foot-high, 120-foot-wide concrete dam to divert water from Lena Creek through an intake structure, which would include a 2,300-foot-long steel pipeline and a 1,500-foot-long "penstock." The water would flow through a penstock into a large, concrete power house, and then out through a 150-foot-long tailrace into the Hamma Hamma River. The project would also require a six-mile underground

transmission line, a fifty-foot connecting road from the powerhouse to an existing Forest Service road, and other facilities.

The staffs of the Forest Service and the Commission jointly prepared an Environmental Assessment (EA) of the project. The EA concluded that the project would be inconsistent with the Forest Service's 1990 Land Resource Management Plan for the Olympic National Forest (Forest Plan), which designates the Lena Creek area for recreation in a natural, undeveloped setting.3

The EA delivered its opinion that the project would detract from the "natural appearance" of the area, parts of which could be seen from a popular hiking trail. The EA did not add, however, that a substantial number of clear cuts could also be viewed from the same trail. The EA asserted that the project would create an attractive nuisance, warning signs and fences would be needed to prevent vandalism and possible injury to persons who might not heed warnings signs, all of which would impact the pre-construction scenic beauty. The EA also asserted that the diversion of water at the intake facility would reduce the pleasant sights and sounds of Lena Creek's rushing water. Moreover, the EA concluded that the project would be inconsistent with the Forest Service's Spotted Owl Plan, which restricts development in areas of owl habitat, including Lena Creek. Based on the foregoing conclusions, the Commission issued an order denying Rainsong's license application. Id.

Rainsong again filed a request for rehearing, arguing that the EA's factual conclusions were erroneous and that the Commission had failed to balance developmental consider-

ations with the non-developmental ones. On October 22, 1993, the Commission denied the request for rehearing.4 Rainsong timely petitioned for review arguing both that the Commission failed to balance and that the Commission abdicated its authority in relying on the 1990 Forest Plan to determine the purposes of the forest. This court has jurisdiction pursuant to the FPA, S 313(b), 16 U.S.C. S 825l(b).

II.

STANDARD OF REVIEW

Our review of agency licensing decisions is limited to asking whether the agency's action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, or if it was taken without observance of procedure required by law. Loomis Cabinet Co. v. OSHRC, 20 F.3d 938, 941 (9th Cir. 1994). An agency's interpretation of a statutory provision or regulation it is charged with administering is entitled to a high degree of deference. Todd Shipyards Corp. v. Director, Office of Workers Compensation Programs, 950 F.2d 607, 610 (9th Cir. 1991). Courts must, however, reject administrative orders that are contrary to congressional intent. Id. Here we have a competition between two environmental values. Water power using abundant rainfall and favorable topography reduces negative environmental consequences of burning fossil fuel. However, water power engineering in a forest has its own environmental consequences.

III.

DISCUSSION

Rainsong raises two arguments against the Commission's order. First, Rainsong claims that the Commission did not balance developmental and non-developmental factors in its determination. Second, Rainsong contends that the Commission effectively abdicated its authority in favor of relying unduly on the Forest Plan which it understood as strongly protective of the forest's esthetics. We note at the outset that these two arguments are interrelated. Each argument challenges the Commission's interpretation of S 4(e) of the FPA.5

A.

FPA SECTION 4(e) - ITS PLAIN MEANING

The Federal Energy Regulatory Commission shall be guided by S 4(e) of the FPA when considering project applications. Section 4(e) gives the Commission power to "issue licenses . . . for the purpose of constructing . . . project works" on waters subject to Congress' Commerce Clause jurisdiction and on public lands and reservations of the United States. As originally enacted, the statute directed the Commission to exercise this authority for the "development, transmission, and utilization of power." See Federal Power Act, ch. 285, S 4, 41 Stat. 1060, 1065-66 (1920) (codified at 16 U.S.C. S 797(e)). In 1986, to increase sensitivity to environmental concerns, Congress added a provision to the end of S 4(e) that directs the Commission to give "equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish

and wildlife . .. , the protection of recreational opportunities, and the preservation of other aspects of environmental quality" in addition to "power and development purposes" "in deciding whether to issue any license." Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, S 3(a), 100 Stat. 1243, 1243 (1986) (codified at 16 U.S.C. S 797(e)). With respect to "reservations,"6 the statute further directs that licenses "shall be issued . . . only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." 16 U.S.C. S 797(e).

An agency's interpretation of a legislative delegation is entitled to deference where Congress' intent on the issue is not explicit. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)."[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Id. However, courts have a duty to make sure that the agency followed the relevant statute. Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 464 U.S. 89 (1983) ("reviewing courts . . . must not rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute"). In order for this Court to affirm the Commission's interpretation of S 4(e), we must either hold that the agency gave effect to the intent of Congress or, in the alternative, that the statute is inherently ambiguous, making the Commission's interpretation reasonable and worthy of deference.

We look first to the plain meaning of S 4(e). We do not find it to be ambiguous and, thus, we will accept the Commis-

sion's interpretation of S 4(e) only if it is compatible with Congress' clear intent as expressed by the plain meaning of the statute.

[1] The Commission properly interprets S 4(e) to require a threshold determination of consistency with the purposes of a forest reservations before balancing developmental and non-developmental purposes in deciding whether to issue a license.7

An analysis of the structure and purposes of S 4(e) reveals the problems with Rainsong's assertion that the Commission must give equal consideration to developmental and non-developmental issues in determining whether a hydropower project is consistent with the purposes of the forest reservation. The plain meaning of the statute supports the Commission's two-step analysis in which it balances interests only after determining the project's consistency with the forest's purpose.

[2] First, the "reservation" clause forms part of a series of provisos designed to give special attention to the licensing process in certain situations. We must interpret the "reservation" clause consistently with these provisos of which it is a part. These provisos clearly impose threshold requirements wholly different and separate from the Commission's ordinary licensing determination in which it balances developmental and non-developmental purposes. No one contends, for example, that the Secretary of the Army and the Chief of Engineers must balance developmental and non-developmental purposes in deciding whether to approve a project. See 16 U.S.C. S 797(e). Further, balancing has no part in the requirement to submit non-navigation projects on Government dams to Congress or on whether notice need be

given as to a license application. See id. Similarly, the Commission need not balance developmental and non-developmental pur- poses in determining that a "license will not interfere or be inconsistent with the purpose for which [a] reservation was created or acquired." Id.

[3] Second, the Commission's interpretation does not read the 1986 amendment out of the statute for licenses on reservations. Rather, the 1986 amendment forms an integral part of the second inquiry. A Commission determination that a license would not interfere or be inconsistent with the purposes of a reservation does not end the inquiry. The Commission must then, before issuing a license, give equal consideration to developmental and non-developmental purposes. Only after the Commission makes both determinations may it issue any license. The Commission can deny a license without resort to balancing but cannot issue one without giving equal consideration to developmental and non-developmental purposes. Again, looking to the other provisos in S 4(e), no one contends that approval of a license for a project on navigable waters by the Chief of Engineers and the Secretary of the Army results in immediate issuance of a license. Rather, after the Chief of Engineers and the Secretary of the Army approve the project, the Commission must still engage in the required balancing.

[4] Third, an interpretation that requires the Commission to balance developmental and non-developmental purposes in determining whether a license is consistent with the purposes of a forest involves significant conceptual difficulties. The purposes of a reservation may not equate with the purposes listed in S 4(e). Yet, Rainsong wants the Commission to incorporate all the various purposes into the consistency

determination. The better course and the course outlined in the statute separates the inquiries. The Commission must consider all the purposes not as part of one grand inquiry, but in two steps -- a consistency inquiry in which it looks to the purposes of the reservation and a second inquiry in which it looks to the purposes listed in S 4(e). Rainsong's interpretation effectively substitutes the purposes listed in S 4(e) for the purposes of the reservation. Rainsong frames the test as "the Commission must give equal consideration to the developmental and non-developmental issues to determine if the hydropower project is consistent" with the purposes of the reservation. Thus, Rainsong implicitly appears to recognize the difficulty of grouping all the purposes into one inquiry and its solution violates the express direction of the statute to look at "purposes."

[5] The Commission's interpretation properly accounts for the language, purposes and structure of S 4(e), and thus the Commission did not need to engage in any balancing before denying Rainsong's application if it properly found that the license would interfere with or be inconsistent with the purpose for which the reservation was created.

B.

ABDICATION OF AUTHORITY—

[6] The Commission's presumptive reliance on the Forest Service's 1990 Plan to determine the "purpose for which" Olympic National Forest "was created or acquired " constitutes an impermissible interpretation of its statutory mandate. We thus remand to the Commission for proceedings in accordance with this opinion.

[7] Under the FPA, the Commission has the "exclusive authority to issue all licenses." Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 775 (1984); see also 16 U.S.C. S 797(e). Section 4(e) provides that "licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired."

[8] The statute does not indicate how the Commission is to determine "the purpose for which [a] reservation was created or acquired." If the Commission were simply interpreting S 4(e) in making this determination, this Court must uphold a permissible interpretation of the statute by the Commission. See City of Seattle v. FERC, 923 F.2d 713, 715 (9th Cir. 1991) (the court of appeals generally shows "great deference" to the Commission's interpretation of the law it is charged with administering). However, in relying on the Forest Plan to make its determination of the purposes of the forest reservation, the Commission not only interprets S 4(e) but also interprets the National Forest Management Act ("NFMA"). Effectively, the Commission has interpreted the NFMA as directing the Forest Service to determine the "purpose for which" a forest "was created or acquired." This Court need not defer to the Commission's interpretation of a statute it is not charged with administering.

[9] Congress, by statute, has established "the purpose for which a [forest] was created or acquired." See 16 U.S.C. S 475 ("No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows,

and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States . .. ."); 16 U.S.C. S 528 ("It is the policy of Congress that the national forests are established . . . for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."). The Forest Service is legislatively mandated to "manage" the land, not to determine from time to time for what purpose the forest was created. See 16 U.S.C. SS 1600 et seq. The Forest Service develops "resource management plans for units of the National Forest System," 16 U.S.C. S 1604(a), "in accordance with the principles set forth in the Mulitiple-Use-Sustained Yield Act . . . and the National Environmental Policy Act," 16 U.S.C. S 1602, but cannot alter the original purposes of a forest reservation.

[10] The Commission should focus on the statutorily prescribed purposes of the forest reservation as mandated by S 4(e). See 16 U.S.C. SS 475, 528. Though the Commission may look to Forest Management Plans for the balancing portion of the statute, they are not determinative of the purpose of the forest reservation. United States v. New Mexico, 438 U.S. 696 (1978), establishes that "Congress intended national forests to be reserved for only two purposes --`to conserve the water flows, and to furnish a continuous supply of timber for the people.' . . . National forests were not to be reserved for esthetic, environmental, recreational, or wildlife preservation purposes." Id. at 707-08.

[11] This is not to say that only water flows and timber may be considered in determining whether to grant a permit. The "purpose for which such reservation was created " controls the finding that is a prerequisite to issuing a license within

the reservation. But the statute does not limit the Commission to that condition. The statute requires a second inquiry. The Commission, in deciding whether to issue a permit (including a permit on a reservation), "shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreation opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C.S 797(e). A proposed license could be consistent with the purpose for which the national forest reservation was created, yet fail this "equal consideration" test because of its effect on "environmental quality."

[12] We do recognize that this interpretation of the Commission's duties under S 4(e) can possibly lead to inconsistent determinations of the appropriate use of a National Forest. See 16 U.S.C. S 1604(i) ("Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans."). Such inconsistencies may result when hydro-power plants are built in forests, and one agency has exclusive control over hydropower licenses and another has control over forest management. We do note that Congress has provided a means to reduce any inconsistencies by giving the Secretary of Agriculture authority to impose conditions necessary for the adequate protection and utilization of a forest in any hydropower license. See 16 U.S.C. S 797(e); Escondido, 466 U.S. at 773-74 ("Congress was no doubt interested in centralizing federal licensing authority into one agency, but it is clear that it did not intend to relieve the Secretaries of all responsibility for ensuring that reservations under their respective supervision were

adequately protected."). Congress thus intended a role for the Forest Service in hydropower licensing decisions, but it did not intend for the Forest Service to make a determination of the purposes of the forest.

The Commission, in giving presumptive weight to the Forest Plan, has upset the statutory scheme. On remand, the Commission must make an independent determination as to whether "the license will not interfere or be inconsistent with the purpose for which" Olympic National Forest "was created or acquired."

PETITION GRANTED and REMANDED.

the end

FOOTNOTES

1 Rainsong Co., 50 Fed. Energy Reg. Comm'n Rep. (CCH) par. 61,079, 61,217 (Jan. 25, 1990).

2 Id. at 61,219.

3 The previous Forest Plan, promulgated in 1978, also provided that the Lena Creek area be managed to preserve its recreational nature. See Rainsong Co., 63 Fed. Energy Reg. Comm'n Rep. (CCH) par. 61,157 at 61,994 (May 5, 1993). However, under the 1978 plan, the Lena Lake area was to be managed to protect the area's "recreational values" and the goals were to be the "maintenance and enhancements of the recreation area." Rainsong Co., 50 FERC at 61,079. The plan also contemplated "concentrated recreation use." Id. at 61,079 n.6. In the 1990 plan, the Forest Service changed its plan to "an experience mostly free from the sights and sounds of other people," 63 FERC 61157 "in a Primitive or Semi-Primitive setting." Id. at n.11.

4 Rainsong Co., 65 Fed. Energy Reg. Comm'n Rep. (CCH) 61,104 (Oct.22, 1993).

5 Section 4(e) is codified at 16 U.S.C. S 797(e).

6 The Olympic National Forest is a "reservation" for purposes of the FPA. 16 U.S.C. S 796(2) (" '[R]eservations' means national forests . . . .").

7 See Rainsong, Co., 65 Fed. Energy Reg. Comm'n Rep. at 61,576 ("Since we find that the project is inconsistent with the Forest Plan, we do not reach any balancing of developmental and non-developmental values.").

IV FERC ORDER ON REMAND

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Vicky A. Bailey, James J. Hoecker,
William L. Massey, and Donald F. Santa, Jr.

Rainsong Company) Project No. 6287-009

ORDER ON REMAND

(Issued March 28, 1997)

The United States Court of Appeals for the Ninth Circuit has remanded to the Commission our orders denying a license to Rainsong Company for the proposed 5-megawatt Lena Creek Project, to be located on Lena Creek in Jefferson and Mason Counties, Washington, on lands partly within the Olympic National Forest. 1/ For the reasons discussed below, we again deny the license.

BACKGROUND

On November 8, 1984, Rainsong filed an application for license for the Lena Creek Project. In June 1987, the Director, Office of Hydropower Licensing, issued an order denying the application on the ground that the project would have entailed construction activities that were prohibited by the U.S. Forest Service's then-current land management plan

for the area in which the project would have been located. 2/ Rainsong appealed the denial, and in January 1990 the Commission reinstated the license application and gave Rainsong the opportunity to resolve its conflicts with the Forest Service. 3/

In July 1990, the Forest Service issued its Land Resource Management Plan for the Olympic National Forest, which superseded the earlier plan. On July 23, 1991, Rainsong filed an amended application for license, which sought to reduce the project's impacts through various means. 4/ In January 1992, the Forest Service issued a Final Environmental Impact Statement on Management for the Northern Spotted Owl in the National Forests (States of Washington, Oregon and California)(Spotted Owl Plan). 5/ The heart of the Spotted Owl Plan was the designation and protection of habitat conservation areas, in which only very limited construction activities would be permitted. Rainsong s entire proposed project (except for a portion of the transmission line) was located within a habitat conservation area. 6/

The staffs of the Commission and the Forest Service prepared an environmental assessment (EA) of the Lena Creek Project. The EA concluded that, even with the implementation of mitigation measures imposed by the licensee and additional measures recommended in the EA, the project nonetheless would be inconsistent with the Olympic National Forest Plan, which establishes the goal for the management area in which the project would be located as being to provide primitive and semi- primitive non-motorized recreation in a predominantly natural or natural-appearing environment, and states that development of hydropower projects in such areas should generally not be

permitted. 7/ The EA determined that the project facilities would mar the aesthetic appearance of the area, and that the diversion facilities and impoundment would attract, and pose a hazard to, hikers, thus requiring warning signs, fences, etc., further detracting from the area s natural appearance. 8/ The EA also concluded that the project would be inconsistent with the Spotted Owl Plan, in that it would have clearly adverse impacts on owl habitat in an area of demonstrated high value to the maintenance and recovery of the species. 9/ The EA therefore recommended denying the license.

The Commission reviewed the Lena Creek Project under Section 4(e) of the Federal Power Act. 10/ As an initial matter, Section 4(e) states, with regard to projects located on reservations of the United States (including national forests), that licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired. . . . Second, Section 4(e) provides, with regard to all licenses issued by the Commission, that:

> In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

The Commission concluded that because the project would preclude attainment of the land management goals and objectives set forth in the Forest Plan, the project would interfere and be inconsistent with a purpose of the Olympic National Forest. Thus, pursuant to Section 4(e), the Commission denied the license. The Commission did not rely on the project s possible inconsistency with the Spotted Owl Plan, because the U.S. Fish and Wildlife Service had not yet completed a recovery plan for the owl, which was necessary before the national forests could determine what actions were necessary to implement the Spotted Owl Plan. 11/ Because the Commission determined that the project was inconsistent with the purposes of the Olympic National Forest, it did not reach the second test set forth in Section 4(e), that is, the balancing of developmental and non-developmental resources. The Commission subsequently denied rehearing, and Rainsong filed an appeal.

The Court upheld the Commission s conclusion that Section 4(e) requires the Commission to make a threshold determination as to whether a project located on a reservation interferes or is inconsistent with the purposes of the reservation. If the Commission finds an inconsistency, its inquiry ends, and it must deny the license. The Court agreed that only after determining that there is no inconsistency does Section 4(e) require the Commission to balance developmental and non-developmental values in determining whether to issue a license. 12/

However, the Court reversed the Commission s determination that it would defer to Forest Plans as evidence of the purposes for which national forests were created. The Court held that Congress has by statute established the

purpose for which national forests were created or acquired, and that while the Forest Service is authorized to manage forest land, it has no authority to determine for what purpose the forest was created. Thus, the Commission should focus on the statutorily- prescribed purposes of the forest reservation in making its initial interference/inconsistency finding. 13/ In cases where the Commission determines that a project will not interfere or be inconsistent with the purposes of a reservation, the Court explained, the Commission nonetheless can consider a range of factors, including Forest Plans, in performing the balancing required under the equal consideration portion of Section 4(e). 14/ The Court then remanded the case to the Commission.

DISCUSSION

To comply with the court s remand, we must first determine the statutorily mandated purposes of the Olympic National Forest, and then decide whether the Lena Creek Project interferes or is inconsistent with those purposes.

The Organic Administration Act of 1897 15/ established the purposes for which national forests could be created:

> No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.

Congress later expanded these purposes in the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), 16/ stating that:

> It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. [These purposes] are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established. . . .

We therefore conclude that the purposes of the Olympic National Forest are to "secure favorable conditions of water flows, and to furnish a continuous supply of timber," as well as "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 17/ We now must determine whether the Lena Creek Project is inconsistent with these purposes.

The Rainsong court stated that the Commission should look to legislation to determine the purposes of the forest, and that the Commission could rely on Forest Plans in performing the balancing required under Section 4(e). 18/ The court did not state whether the Commission could, after it has independently determined the purposes of the national forests, use the Forest Plans in determining whether a project would interfere or be inconsistent with these purposes. We determine that we may do so.

Forest Plans are prepared by the agency with responsibility for managing the national forests, after study of all affected resources, and are accompanied by detailed environmental impact statements. The plans include the Forest Service's management goals and prescriptions for forest resources. To the extent that a Forest Plan is designed to implement the purposes of a forest, it constitutes strong

evidence regarding whether a particular activity is consistent with those purposes. Therefore, once we have determined the purposes of the forest, we may then use the Forest Plans to help us decide whether a proposed project passes the interference/inconsistency test. We will also examine the environmental document prepared in each licensing proceeding, as well as all other evidence in the record.

We conclude that the Lena Creek Project is inconsistent with the purposes of the Olympic National Forest. As established in MUSYA, those purposes include "outdoor recreation." To promote appropriate recreational use of the area that includes the proposed project site, the Forest Plan establishes the goal for this area of maintaining a natural or natural-appearing environment in which management activities are not conspicuous. 19/ As explained in detail herein, the project would defeat this goal. Moreover, the EA independently concluded that the project would detract from the natural setting of the area in which it would be located, and that it would pose a hazard to recreationists. In consequence, even in the absence of the Forest Plan, we would find that the project is inconsistent and would interfere with the purposes of the forest.

Even if we did not find that the project interfered or was inconsistent with the purposes of the Olympic National Forest, we would nonetheless deny the license.

Section 4(e) requires the Commission, in deciding whether to grant a license for a project, to give equal consideration to power and development purposes and to energy conservation, fish and wildlife, "the protection of recreational opportunities, and the protection of other aspects

of environmental quality." In amending Section 4(e) through the Electric Consumers Protection Act of 1986, Congress expressed the view that nondevelopmental values must be considered adequately by the Commission when it decides whether and under what conditions to issue a hydropower license for a project. The Conference Report states that:

> [T]here are instances in which careful and thoughtful consideration of the impact of a proposed project would and should lead to the conclusion that an original license ought not to be issued. . . . If nonpower values cannot be adequately protected, FERC should exercise its authority to restrict or, particularly in the case of original licenses, even deny a license on a waterway. [20/]

As explained in the EA, during the proposed two-year construction phase of the project, construction activities would substantially intrude on the scenic qualities of the area. Thereafter, the project would be permanently visible, marring the natural characteristics of the area. In addition, the project would divert up to 90 cubic feet per second of water from Lena Creek, thereby reducing the pleasant sights and sounds associated with rushing and cascading water in the creek. Also, hikers on the Lena Creek Trail (one of the most popular trails in the Olympic National Forest) and campers in nearby campgrounds would view the project. Hikers would be attracted to the diversion facilities or to the pool at the project's dam. These facilities could present a safety hazard to the hikers and require the construction of fences, warning signs and the like, further detracting from the natural appearance of the area. To the extent that hikers leave the

main trail to visit project facilities, they would create new trails, with the attendant risk of increased erosion. 21/

Moreover, as noted above, these adverse impacts conflict with the management goals of the Forest Service as set forth in the Forest Plan. We weigh the Forest Service's goals heavily in our consideration of non-developmental resources. An applicant proposing a project that conflicts with a forest plan will have to show that the power and developmental purposes of the project overcome these important non-developmental considerations. The applicant here has not done so.

The Commission takes seriously its responsibility to weigh carefully power and development purposes, on the one hand, and, on the other, non-developmental purposes such as the protection of recreational opportunities. In this instance, we have thoroughly explored the possibility of authorizing the project and providing adequate protection for the aesthetic and recreational values existing at the project site. The staffs of the Commission and the Forest Service attempted to develop measures that would reduce the project's impacts on aesthetics and recreation to an acceptable level, but were unable to do so. After taking into account all the circumstances of this case, we find that the benefits of the use of the site for water-power development are outweighed by the project's adverse impacts on the important recreational and aesthetic features of the site, and its inconsistency with the Forest Plan. 22/ We therefore deny the license application.

The Commission orders:

The application for license for the Lena Creek Project No. 6287, filed by Rainsong Company on November 4, 1984, and amended on July 23, 1991, is denied.

By the Commission.

(S E A L)

Lois D. Cashell,
Secretary.

FOOTNOTES

1/ See Rainsong Company, 63 FERC 61,157, reh'g denied, 65 FERC 61,104 (1993).

2/ See 63 FERC at p. 61,994.

3/ See 50 FERC 61,079.

4/ See 63 FERC at pp. 61,994-95.

5/ The northern spotted owl is listed under the Endangered Species Act, 16 U.S.C. □ 1531, et seq., as a subspecies threatened with extinction.

6/ See 63 FERC at pp. 61,995-96.

7/ See id. at p. 62,028.

8/ See id. at pp. 62,028-29.

9/ See id. at p. 62,029.

10/ 16 U.S.C. □ 797(e).

11/ See id. at p. 61,996. On April 13, 1994, the Forest Service issued its Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl, which replaced the Spotted Owl Plan. The Standards and Guidelines provide general guidance regarding the management of areas, including the project site, that are habitat for the spotted owl. Were we to license the project, we would first be required to consult with the Forest Service and the U.S. Fish

and Wildlife Service regarding the project's impacts on the spotted owl and the marbled murrelet, another federally-listed threatened species whose range includes the area surrounding the project site, to determine if the project could be constructed consistent with the Standards and Guidelines and the requirements of the Endangered Species Act.

12/ Rainsong Co. v, FERC, 1997 U.S.App.Lexis 1911 at *7-*11 (9th Cir. 1997)

13/ Id. at *13-*19

14/ See id.

15/ 16 U.S.C. □ 473 et seq.

16/ 16 U.S.C. □ 528 et seq.

17/ After citing MUSYA, the Court also references U.S. v. New Mexico, 438 U.S. 696, 707-08 (1978), for the proposition that Congress intended national forests to be reserved for only two purposes--to conserve the water flows, and to furnish a continuous supply of timber for the people. . . . National forests were not to be reserved for esthetic, environmental, recreational, or wildlife purposes. We do not understand this reference to mean that we should disregard the expanded purposes of the national forests as set forth in MUSYA. In U.S. v. New Mexico, the Court was examining the limited question (which is not relevant to our decision here) of whether the enactment of MUSYA expanded the United States reserved water rights in national forests. The Court held that the Organic Administration Act was controlling on that particular issue, and that MUSYA had not expanded the federal government s reserved water rights. At the same time, the Court specifically stated that we conclude that [MUSYA] was intended to broaden the purposes for which national forests had previously been administered . . . . Congress intended [MUSYA] to broaden the benefits accruing from all reserved national forests. Id. at 713-14. Thus, in performing our statutorily prescribed role of determining whether a project interferes or is inconsistent with the purposes of a national forest, we must look to the expanded purposes set forth in MUSYA, as well as Congress original purposes of conservation of water and timber.

18/ 1997 U.S. App.Lexis 1911 at *13-19.

19/ See 63 FERC at p. 62,024. The Forest Plan divides the forest into "management units." As noted above, the management unit in which the project

would be located is placed in the category of "undeveloped non-motorized recreation," which requires as natural-appearing an environment as possible. Based on the Environmental Impact Statement prepared by the Forest Service in connection with the establishment of the Forest Plan, the plan also establishes goals for the forest's various natural resources, such as timber and water management, fish and wildlife, air quality, vegetation, soils, cultural resources, etc.

20/ Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 934, 99th Cong., 2d Sess. 21-22 (1986).

21/ See 63 FERC at pp. 62,021-25.

22/ See Summit Hydropower, 61 FERC □ 61,010 at pp. 61,081-82 (1992).

V. FERC ORDER DENYING REHEARING...

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Vicky A. Bailey, James J. Hoecker,
William L. Massey, and Donald F. Santa, Jr.

Rainsong Company) Project No. 6287-010

ORDER DENYING REHEARING

(Issued June 13, 1997)

Rainsong Company has filed a timely request for rehearing of our March 28, 1997 order 1/ responding to the United States Court of Appeals for the Ninth Circuit's remand to the Commission of proposed 5 megawatt Lena Creek Project, to be located on Lena Creek in Jefferson and Mason Counties, Washington, on lands partly within the Olympic National Forest. 2/ In the March 28 order, we again denied the license. For the reasons discussed below, we deny rehearing.

BACKGROUND

On November 8, 1984, as amended July 23, 1991, Rainsong filed an application for license for the Lena Creek Project. 3/ The staffs of the Commission and the U.S. Forest Service prepared an environmental assessment (EA) of the project. The EA concluded that, even with the implementation of measures imposed by the licensee and

additional ;measures recommended in the EA, the project nonetheless would be inconsistent with the Olympic National Forest Plan, issued by the Forest Service in July 1990, which states that the goal for the management area in which the project would be located is "to provide primitive and semi-primitive non-motorized recreation in a predominantly natural or natural-appearing environment," and states that development of hydropower projects in such areas should generally not be permitted. The EA determined that the project facilitie4s would mar the visual aesthetics of the area, and that the diversion facilities and impoundment would attract, and pose a hazard to, hikers, thus requiring warning signs, fences, etc., further detracting from the area's natural appearance. 4/ The EA therefore recommended denying the license.

Section 4(e) of the Federal Power Act (FPA) establishes two criteria which the Commission was required to apply in reviewing the Lena Creek Project. 5/ As an initial matt4er, Section 4(e) states, with regard to projects located on reservations of the United States (including national forests), that "licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired...." Second, Section 4(e) provides, with regard to all licenses issued by the Commission, that:

> In deciding whether to issue any license under this Part for any project, ;the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and

enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

The Commission concluded that because the project would preclude attainment of the land management goals and objectives set forth in the Forest Plan, the project would interfere and be inconsistent with the purpose of the Olympic National Forest. Thus, pursuant to Section 4(e), the Commission denied the license. Because the Commission determined that the project was inconsistent with the purposes of the Olympic National Forest, it did not reach the second test set forth in Section 4(e), that is, the balancing of developmental and non-developmental resources. The commission subsequently denied rehearing, and Rainsong filed an appeal.

The Court upheld the Commission's conclusion that Section 4(e) requires the Commission to make a threshold determination as to whether a project located on a reservation interferes or is inconsistent with the purposes of the reservation. If the commission finds an inconsistency, its inquiry ends, and it must deny the license. The court agreed that only after determining that there is no inconsistency does Section 4(e) require the Commission to balance developmental and non-developmental values in determining whether to issue a license. 6/

However, the court reversed the Commission's determination that it would defer to Forest Plans as evidence of the purposes for which national forests were created. The

court held that Congress has by statute established the purpose for which national forests were created or acquired, and that while the Forest Service is authorized to manage forest land, it has no authority to determine for what purpose the forest was crated. Thus, "the Commission should focus on the statutorily-prescribed purposes of the forest reservation" in making its initial interference/inconsistency finding. 7/ In cases where the Commission determines that a project will not interfere or be inconsistent wit the purposes of a reservation, the court explained, the Commission nonetheless can consider a range of factors, including Forest Plans, in performing the balancing required under the "equal consideration" portion of Section 4(e). 8/ The court then remanded the case to the Commission. 9/

In the March 28 order, the Commission determined that the purposes of the national forests were originally established by the Organic Administration Act of 1897, 10/ and later expanded by the Multiple-Use Sustained-Yield Act of 1960 (MUSYA). 11/ Pursuant to those two acts, the purpose of the Olympic National Forest are to "secure favorable conditions of water flows, and to furnish a continuous supply of timber, "as well as "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 12/ The commission then stated that, once it has independently determined the statutory purposes of a forest, it may refer to the Forest Plans prepared by the Forest Service, the agency charged with administering the national forests, in deciding whether a proposed project passes the interference/inconsistency test. 13/

Using this analytical framework, the Commission concluded that the Lena Creek Project is inconsistent with the

purposes of the Olympic National Forest, specifically outdoor recreation, because construction and operation of the project would defeat the Forest Service's goal for the area in which the project would be located of maintaining a natural or natural - appearing environment in which management activities are not conspicuous. 14/ Moreover, the Commission noted that the EA provided an independent basis for the inconsistency finding, in that it demonstrated that the pr0ject would detract from the natural setting of the area in which it would be located, and that it would pose a hazard to recreationists. 15/

The Commission further explained that it would deny the license even in the absence of a finding that the project interfered or was inconsistent with the purposes of the Olympic National Forest. As noted, Section 4(e) requires the Commission, in deciding whether to grant a license for a project, to give equal consideration to power and development purposes and to recreational opportunities, and the protection of other aspects of environmental quality." The project would have significant adverse impacts on recreation and aesthetics, which are not balanced by concomitant developmental considerations. 16/

In its request for rehearing, Rainsong argues that the Commission's conclusion that outdoor recreation is one of the purposes of the Olympic National Forest is incorrect, citing the Ninth Circuit's decision and U.S. v. New Mexico. 17/ In addition, Rainsong asserts that its reservation of the project site under Section 24 of the FPA bars the Forest Service from taking any action adverse to the project. Rainsong further alleges that the EA, on which Commission based its analysis, contains numerous errors. Finally,

Rainsong claims that the Commission failed to balance properly developmental and non-developmental objectives in acting on Rainsong's application. 18/

DISCUSSION

Many of the arguments in Rainsong's request for rehearing were raised in its earlier filings and were addressed in the Commission's October 1993 order on rehearing. 19/ Below, we address Rainsong's additional arguments.

A. The Purposes of the Olympic National Forest

Rainsong argues that the Commission, in making its interference/inconsistency determination, was required to look at the "primary" purposes of the forest - - which Rainsong asserts are conservation of water and timber resources -- and that the Commission improperly based its decision on the project's impacts on recreation, which Rainsong terms a "secondary" purpose. Rainsong also contends that the Commission misreads the Ninth Circuit's decision, and that of the supreme Court in U.S. v. New Mexico, which Rainsong reads as supporting its argument regarding the limited purposes of the national forests.

As we explained in the March 28 order, our holding is consistent with the relevant statues and precedent. While the Organic Administration Act indeed established only conservation of water and timber as the purposes for which national forests were created, those purposes were later expanded by MUSYA to include a number of other purposes, including outdoor recreation. 20/ This expansion was specifically recognized by the Court in the New Mexico

case, and we do not read that Ninth Circuit as disagreeing with this conclusion. 21/

B. Section 24

Section 24 of the FPA 22/ provides that "(a)ny lands of the United States included in any proposed project under the provisions of this Part shall from the date of filing of the application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress." On rehearing, Rainsong contends for the first time that Section 24 operated to remove from Forest Service jurisdiction the lands on which Rainsong proposed to construct the Lean Creek Project, and that the Forest Service thereafter lacked authority to implement management plans or other actions that would prevent the project from going forward.

Rainsong misconstrues Section 24. Where, as here, lands reserved as a power site under Section 24 are already part of a reservation of the United States, the power site reservation cannot operate to destroy the previous status of those lands, nor can it denigrate the ability of the Forest Service or other federal agencies to manage lands under their jurisdiction. 23/ Otherwise, an applicant could take control of any federal lands simply by applying for a project to be located there. As we have previously explained, Section 4(e) remains fully applicable in the case of lands subject to a power site reservation. 24/

C. Adequacy of the EA

Rainsong disputes the EA's analysis of the impacts of the Lena Creek Project, claiming that the EA's conclusions regarding the recreational and aesthetic impacts of the project are erroneous, unfounded, and not based on substantial evidence. 25/

As we explained in our 1993 order denying rehearing, Rainsong's disagreements with the EA's conclusions are of necessity subjective. 26/ We rely on the findings of the professional staff who prepared the EA, whose job it is to perform in an impartial and disinterested manner, the necessary analyses pursuant to the applicable laws and regulations. 27/ Rainsong has made no assertions that cause us to doubt that staff has done just that here. 28/

D. Balancing of Developmental and Non- Developmental Values

Section 4(e) requires us to give equal consideration to developmental and non-developmental values when acting on a license application. Rainsong claims that we have not done so.

First, as the Ninth Circuit stated, we are not required to perform this balancing where, as here, we conclude that a project fails the interference/inconsistency test. Second, as we explained in March 27 order, the project would have adverse impacts on recreation in the Olympic National Forest, and neither the Commission nor the Forest Service has been able to develop measures that would obviate these impacts. Moreover, the project would conflict with the Forest Service's management goals, which we weigh heavily in our consideration of non-developmental resources.

Rainsong has failed to demonstrate that the power and developmental purposes of the project overcome these important on-developmental consideration. Thus, we have determined that the benefits of the use of the site for water-power development are outweighed by the project's adverse impacts on the important recreational; and aesthetic features of the site, and its inconsistency with the Forest Plan. 29/

The Commission orders;

The request for rehearing, filed on April 28, 1997 by Rainsong Company, is denied.

By the Commission.

(S E A L)

Lois D. Cashell,
Secretary.

FOOTNOTES

1/ Rainsong Co., 78 FERC 61,352.

2/ See Rainsong Company, 63 FERC 61,157, reh'g denied, 65 FERC 61,104 (1993).

3/ The subsequent procedural history of the application is described in the March 28 order. See 78 FERC at pp. 62,483-84.

4/ See 63 FERC at pp. 62,028-29,

5/ 16 U.S.C. §797(e).

6/ Rainsong Co. v. FERC, 106 F. 3rd 269, 273 (9th Cir. 1997).

7/ Id at 274-75.

8/ See id.

9/ In its request for rehearing, Rainsong refers to the Ninth Circuit's March 19,

1996 opinion. That opinion was withdrawn by the court and replaced by the February 6, 1997, opinion.

10/ 16 U.S.C. § 473 et seq.

11/ 16 U.S.C. § 528 et seq

12/ 78 FERC at p. 62,484.

13/ Id. At p. 62,485. The Commission also will examine the environmental document prepared in each licensing proceeding, as well as all other evidence in the record. Id.

14/...See 63 FERC at p. 62, 024. The Forest Plan divides the forest into "management units." As noted above, the management unit in which the project would be located is placed in the category of "undeveloped non-motorized recreation," which requires as natural - appearing an environment as possible. Based on the Environmental Impact Statement prepared by the Forest Service in connection with the establishment of the Forest Plan, the plan also establishes goals for the forest's various natural resources, such as timber and water management, fish and wildlife, air quality, vegetation, soils, cultural resources, etc.

15/ 78 FERC at p. 62,485.

16/ Id. At pp. 62,485-86.

17/ 438 U.S. 696 (1978)

18/ On April 18, 1997, the Forest Service filed a motion to intervene (but did not seek to file a rehearing request) "so that the FS can participate as a party in future appellate litigation should any be filed." We deny the motion, pursuant to our policy that an agency that has served as a cooperating agency in a proceeding, as the Forest Service has here, may not thereafter intervene in that proceeding. The reason for this policy is that staff of a cooperating agency is treated in some respects as though it were Commission staff, including having conversations and exchanging information that may not be put in the record, just as Commission staff property shares predecisional information internally. To allow such a cooperating agency to intervene in a proceeding would put it in the position of having information that was not available to other parties, in violation of our rule prohibiting ex parte communications. See 18 C.F.R. §385.2101 (1996). We note, however, that Rule 29 of the Federal Rules of Appellate Procedure gives the

Forest Service, as a federal agency, the right to file a brief as an amicus curiae in any appellate proceeding. It may also be able to intervene under Rule 15 (d). Neither of these rules lists as a prerequisite intervention in proceedings below. Thus, our denial of the motion to intervene does not appear to affect the Forest Service's ability to participate in appellate proceedings in this case.

19/ See n.2, supra.

20/ Rainsong incorrectly asserts that outdoor recreation is a "management objective" under MUSYA and, as such, cannot properly be viewed as a forest purpose. On the contrary, MUSA clearly includes recreation in its list of purposes.

21/ See 78 FERC at pp. 62,484-85 and n.17. As the Court noted, MUSYA expands the purposes for which the forests are established, and MUSYA's legislative history makes clear that those purposes are "supplemental to, but not in derogation of" the original purposes. See 438 U.S. at 714.

22/ 16 U.S.C. § 818.

23/ Rainsong's Section 24 reservation cannot prevent the Forest Service from promulgating new management plans, since the authority for such plans derives from the underlying National Forest reservation, which preceded the Section 24 reservation.

24/ See Joseph M. Keating, 70 FERC 61,240 at pp. 61,742-43 (1995), appeal pending sub nom. Keating v. FERC, No. 95-1232 (D.C. Cir. Argued March 17, 1997); Second Annual Report of the Federal Power Commission at p. 223 (1922) ("where the power reservation is superimposed upon some other reservation, such as a forest reserve.... The license should contain the conditions prescribed by the head of the proper department with regard to such reservation."). See also Federal Power Commission v. Oregon, 349 U.S. 435, 444 (1955) (describing sequential reservations).

25/ Rainsong also asserts that it ws unfairly deprived of an opportunity to comment on the EA before it was issued, and that it was denied a hearing on the factual issues. There is no requirement in our regulations or those of the Council on Environmental Quality that a draft EA be published for public comment prior to publication of a final EA. See OMYA, Inc., 74 FERC 61,353 at pp. 62,083-84 (1996), aff'd on other grounds sub nom. OMYA, Inc. v. FERC, 111 F.2d 179

(D.C. Cir. 1997). Moreover, we have considered all of Rainsong's arguments and thus have indeed provided it with a hearing. See Sierra Association for Environment V. FERC, 744 F.2d 661, 662-63 (9th Cir. 1984) (no need for trial-type hearing where Commission considered party's arguments).

26/ For example, Rainsong alleges that it could undertake measures, including vegetative screening, that would satisfy the Forest Service's visual quality objectives for the area. However, the EA concluded that such measures would not be fully effective, and that project features would not blend into the surrounding landscape and could not be completely concealed from the view of hikers on the adjacent Lena Lake National Recreation Trail. See 63 FERC at pp. 62,022-25; 62,028-29. We accept these latter conclusions.

27/ See 65 FERC at pp. 61,575-76.

28/ Throughout its request for rehearing, Rainsong avers that it has received unfair, prejudiced treatment at the hands of the Commission and the forest Service. Nothing in the record supports these allegations. Rainsong has been required, like any other applicant, to bear the burden of showing that its project is in the public interest. It has failed to do so. A license is a privilege, not a right, and is issued only on a showing that the public interest will be served. See Udall v. Federal Power Commission, 387 U.S. 428, 450 (1967).||

Rainsong asserts that statements by staff members of the Commission and the Forest Service over the course of the license application proceeding led it to believe that its project was consistent with the Forest Plan. Rainsong also points to the Commission's acceptance of its application, "acceptance" of the project's reservation under Section 24 (such reservations being automatic under Section 24), and reversal of the 1987 order dismissing the application as further evidence that the agencies considered the project to be consistent with the Forest Plan. These actions were all preliminary; the Commission did not and could not make its interference/inconsistency determination in this case until after it had completed its environmental assessment of the project. Moreover, statements by Commission staff do not bind the Commission; only statements by the Commission itself are definitive. See, e.g., Aliceville Hydro Associates v.

FERC, 61,121, aff'd sub nom. Aliceville Hydro Associates v. FERC, 800 F.2d 1147 (D.C. Cir. 1986).

Rainsong also asserts that the Commission has approved other projects in the Olympic National Forest during the pendency of this proceeding. While this claim by itself is irrelevant, since the facts of each proceeding are unique and depend on matters such as the proposed site and project configuration, we have approved only one such project. See City of Aberdeen, Washington, 40 FERC 62,316 (1987). That case involved a proposal to locate a project at the existing Wynoochee Dam, administered by the U.S. Army Corps of Engineers. There was no existing or potential recreational use at the project site, and there were no allegations that the project would have unacceptable adverse impacts on forest resources. We have denied other applications for projects in the Olympic National Forest, on the basis that they were inconsistent with forest purposes and the management goals of the Forest Service. See, e.g., Hydro Resource Co., 41 FERC 62,140 (1987); Olympus Energy Corp. 41 FERC 62,141 (1987)

29/ See 78 FERC at pp. 62,485-86.

VI. 5 U.S.C. §555(e)

Sec. 555. Ancillary matters
(a-d) [Omitted]
(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

VII. 16 U.S.C. §825h

Sec. 825h. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

VIII. 16 U.S.C. §825l

Sec. 825l. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the

District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any

such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

IX. 18 CFR §385.2007

Sec. 385.2007 Time (Rule 2007).

(a) Computation.

(1) Except as otherwise required by law, any period of time prescribed or allowed by statute or Commission rule or order is computed to exclude the day of the act or event from which the time period begins to run.

(2) The last day of any time period is included in the time period, unless it is a Saturday, Sunday, part-day holiday that affects the Commission, or legal public holiday as designated in section 6103 of title 5, U.S. Code, in which case the period does not end until the close of the Commission business of the next day which is not a Saturday, Sunday, part-day holiday that affects the Commission, or legal public holiday.

(b) Date of issuance of Commission rules or orders.

(1) Any Commission rule or order is deemed issued when the Secretary does the earliest of the following: (i) Posts a full-text copy in the Division of Public Information; (ii) Mails or delivers copies of the order to the parties; or (iii) Makes such copies public.

(2) Any date of issuance specified in a rule or order need not be the date on which the rule or order is adopted by the Commission.

(c) Effective date of Commission rules or orders.

(1) Unless otherwise ordered by the Commission, rules or orders are effective on the date of issuance.

(2) Any initial or revised initial decision issued by a presiding officer is effective when the initial or revised initial decision is final under Rule 708(d).

X. 18 CFR §385.2010

Sec. 385.2010 Service (Rule 2010).
(a) By participants.
(1) Any participant filing a document in a proceeding must serve a copy of the document on: (i) Each person whose name is on the official service list, or applicable restricted service list, for the proceeding or phase of the proceeding; and (ii) Any other person required to be served under Commission rule or order or under law.
(2) If any person receives a rejection letter or deficiency letter from the Commission, the person must serve a copy of the letter on any person previously served copies of the rejected or deficient filing.
(b) By the Secretary. The Secretary will serve, as appropriate:
(1) A copy of any complaint on any person against whom the complaint is directed;
(2) A copy of any notice of tariff or rate examination or order to show cause, on any person to whom the notice or order is issued;
(3) A copy of any rule or any order by a decisional authority in a proceeding on any person included on the official service list, or applicable restricted service list, for the proceeding or phase of the proceeding.
(c) Official service list.
(1) The official service list for any proceeding will contain:
(i) The names and addresses of any person designated for service in the initial pleading, other than a protest, or in the tariff or rate filing which is filed by any participant; and (ii) The name of counsel for the staff of the Commission.
(2) Any designation of a person for service may be changed by filing a written notice with the Commission and serving

the notice on each person whose name is included on the official service list.

(d) Restricted service list.

(1) For purposes of eliminating unnecessary expense or improving administrative efficiency, the Secretary, an office director, or the presiding officer may establish, by order, a restricted service list for an entire proceeding, a phase of a proceeding, one or more issues in a proceeding, or one or more cases in a consolidated proceeding.

(2) Any restricted service list will contain the names of each person on the official service list, or the person's representative, who, in the judgment of the decisional authority establishing the list, is an active participant with respect to the proceeding or consolidated proceeding, any phase of the proceeding, or any issue in the proceeding, for which the list is established.

(3) Any restricted service list is maintained in the same manner as, and in addition to, the official service list under paragraph (c) of this section.

(4) Before any restricted service list is established, each person included on the official service list will be given notice of any proposal to establish a restricted service list and an opportunity to show why that person should also be included on the restricted service list or why a restricted service list should not be established.

(5) Any designation of a person for service on a restricted service list may be changed by filing written notice with the Commission and serving that notice on each person whose name is on the applicable restricted service list.

(e) Interveners.

(1) If any motion to intervene or any notice of intervention is filed within time period prescribed for that motion or notice, the name and address of any person designated for service in

the motion or notice are placed on the official service list or any applicable restricted service list. Any person placed on the official service list under this paragraph is entitled to service in accordance with this section. If a motion to intervene is denied, the name and address of each person designated for service pursuant to that motion will be removed from the official service list.

(2) If a motion to intervene is not filed within the period prescribed for that motion, the name and address of any person designated for service in the motion are placed on the official service list, or any applicable restricted service list, only after the motion is granted. Any person who files a late motion to intervene will be served only the documents that are filed after the motion is granted.

(f) Methods of service. Service of any document must be made:

(1) By United States mail, first-class or better; or

(2) By delivery in a manner that, and to a place where, the person on whom service is required may reasonably be expected to obtain actual and timely receipt.

(g) Timing of service.

(1) Service is made under this section when the document served is deposited in the mail or is delivered in another manner.

(2) Service of any document must be made not later than the date of the filing of the document.

(h) Certification.

(1) At the time any document required to be served is filed with the Commission, the original of a certificate of service must be attached to the document and a copy of the certificate must be attached to each copy of the document filed with the Commission.

(2) The certificate of service must conform to the following format: I hereby certify that I have this day served the foregoing document upon each person designated on the official service list [or the restricted service list, if applicable] compiled by the Secretary in this proceeding. Dated at this day of , 19 .

Name_____(if applicable)

Address_____

_Telephone

No._____

Supreme Court, U.S.
FILED
JUL 2 1999
CLERK

No. 98-1761

In the Supreme Court of the United States

RAINSONG COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION AND DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner failed to file its petition for review of an order of the Federal Energy Regulatory Commission within the statutory period prescribed by 16 U.S.C. 825*l*(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 151 F.3d 1231. The March 28, 1997 order of the Federal Energy Regulatory Commission (Pet. App. 25a-36a) is reported at 79 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,338. The Commission's June 13, 1997 order denying rehearing (Pet. App. 37a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1998. A petition for rehearing was denied on December 2, 1998 (Pet. App. 9a). The petition for a writ of certiorari was filed on March 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C.

1254(1). Jurisdiction to adjudicate petitioner's claims under 16 U.S.C. 825*l*(b) is disputed.

STATEMENT

1. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, provides that a party aggrieved by an order of the Federal Energy Regulatory Commission (Commission or FERC) may obtain judicial review in the court of appeals by filing "within sixty days after the order of the Commission upon the application for rehearing[] a written petition praying that the order of the Commission be modified or set aside in whole or in part." 16 U.S.C. 825*l*(b). The FPA further specifies that orders of the Commission "shall be effective on the date and in the manner which the Commission shall prescribe." 16 U.S.C. 825h. To implement those statutory mandates (among others), the Commission promulgated 18 C.F.R. 385.2007(b)(1), which provides:

> (1) Any Commission rule or order is deemed issued when the Secretary does the earliest of the following:
>
> (i) Posts a full-text copy in the Division of Public Information;
>
> (ii) Mails or delivers copies of the order to the parties; or
>
> (iii) Makes such copies public.

Finally, 18 C.F.R. 385.2007(c)(1) provides that, "[u]nless otherwise ordered by the Commission, rules or orders are effective on the date of issuance."

2. In 1984, petitioner applied to FERC for a license to build a hydroelectric project in the Olympic National Forest. Pet. App. 25a. Under the FPA, "licenses shall

be issued within any [forest] reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired[.]" 16 U.S.C. 797(e). After an initial round of proceedings before the Commission and the court of appeals (see Pet. App. 10a-24a), the Commission denied petitioner's application as inconsistent with the purposes for which the forest was created (*id.* at 25a-36a), and it reaffirmed that disposition in an order denying rehearing (*id.* at 37a-49a). The Commission issued the latter order on June 13, 1997, posting it in the agency's Public Reference Room on that date. See *id.* at 3a, 8a n.1. Several days later, on June 18, the Commission's Secretary mailed petitioner a copy of the order, which stated on its face that it had been issued on June 13. See *id.* at 5a, 8a n.2.

On August 15, 1997, petitioner filed a petition for review in the court of appeals (Pet. App. 3a), which dismissed the petition as untimely. The court explained that 16 U.S.C. 825h delegates to the Commission the authority to determine the date on which an order becomes effective; that, under 18 C.F.R. 385.2007(b), the order in question was issued on June 13, 1997, the date it was posted, not on the slightly later date on which it was mailed; and that petitioner's appeal was therefore untimely because it was filed more than 60 days after June 13. Pet. App. 3a-8a.

ARGUMENT

The court of appeals' disposition of this case was correct and warrants no further review.

Any party challenging a final order of the Commission must file a petition for review within 60 days "after the order." 16 U.S.C. 825*l*(b). Congress granted the Commission authority to determine the "date" on

which, and the "manner" in which, "[o]rders of the Commission shall be effective." 16 U.S.C. 825h. Despite petitioner's contrary suggestion (Pet. 8), Congress did not distinguish among the "purposes" (*ibid.*) for which the Commission may exercise its authority to determine the date and manner of an order's effectiveness; that authority is unqualified, and it encompasses the authority to determine when the period for filing a petition for review begins to run. The Commission's regulations specifically provide that an order is "deemed issued" (and is therefore "effective") when the Secretary either "[p]osts a full-text copy in the Division of Public Information," "[m]ails or delivers copies of the order to the parties," or "[m]akes such copies public," whichever is "earliest." 18 C.F.R. 385.2007(b)(1) and (c)(1). That regulation disposes of the question presented here, for it confirms that the period for filing a petition for review began on June 13, 1997, 63 days before petitioner filed its petition for review. See generally *Mesa Airlines* v. *United States*, 951 F.2d 1186, 1188-1189 (10th Cir. 1991); *National Black Media Coalition* v. *FCC*, 760 F.2d 1297, 1299 (D.C. Cir. 1985).[1]

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[1] *Hill* v. *Hawes*, 320 U.S. 520 (1944), upon which petitioner relies (Pet. 8), is inapposite. In that case, a district court had failed to serve the parties with copies of its order, and the time for filing a notice of appeal expired before any service was made. To make the losing party whole, the district court vacated its initial order and reentered its judgment, thereby resetting the clock for filing a notice of appeal. This Court upheld that disposition as within the district court's "sound discretion." 320 U.S. at 524. That holding does not support the proposition that a minor, nonprejudicial delay in service confers a constitutional right on a party to disregard the effective date of an administrative order when calculating the period for filing a petition for review. The court of appeals cases on which petitioner relies (Pet. 8-9) are similarly inapposite. In *City of Batavia* v. *FERC*, 672 F.2d 64 (D.C. Cir. 1982), the court

Petitioner nonetheless contends (Pet. 6) that the Commission failed to comply with 18 C.F.R. 385.2010(g)(2), which requires service "not later than the date of the filing," and that this alleged non-compliance delayed the order's date of issuance for purposes of appellate review. Even if Section 385.2010(g)(2) were properly construed to apply to orders of the Commission itself in addition to the "filing[s]" of parties appearing before the Commission, the provision would have no bearing on the issue presented here. Section 385.2010(g)(2) simply addresses the timing of service; it does not address an order's effectiveness or date of issuance, and it cannot operate to toll the relevant period for filing a petition for review. See generally *Stone* v. *INS*, 514 U.S. 386, 405 (1995).

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assumed without discussion that the order in question was issued on the day it was mailed; although a dispute arose concerning the manner of that mailing, the court ultimately resolved the timeliness question on unrelated grounds. *Id.* at 72-73 & n.14. In *Energy Probe* v. *NRC*, 872 F.2d 436 (D.C. Cir. 1989), the agency's order was both signed and mailed on the same date, and the court held only that the period for filing a review petition began on that date rather than the later date on which the aggrieved party received the mailing. *Id.* at 437-438. Finally, in *B.J. McAdams, Inc.* v. *ICC*, 551 F.2d 1112 (8th Cir. 1977), the dispute involved whether the period for filing a petition began on the date of the ICC's final order or only after the ICC subsequently denied a discretionary administrative appeal, an issue not presented here. See *id.* at 1114-1115. Although the court added that the period began when the aggrieved party "received notice" of the order denying the administrative appeal (*id.* at 1115), it did not explain why receipt was the triggering event, and even petitioner does not argue that receipt is the triggering event here. See Pet. 8 (arguing that the relevant period here began when "notice had been sent").

Finally, petitioner claims that "the effect of the decision of the Court of Appeals is to completely liberate FERC from any obligation to serve its decisions upon applicants at all, opening the door to agency abuse and manifest injustice." Pet. 5. That is incorrect. The court of appeals specifically declined to "address the case where an agency intentionally violates its regulations and notifies a party of its decision so late that the party cannot file a timely notice of appeal." Pet. App. 8a n.2. This is certainly not such a case: Although the Commission mailed petitioner a copy of the order on June 18 rather than June 13, the order stated on its face that it had been issued on June 13, and petitioner could not plausibly claim that the minor delay in service prejudiced its ability to file a petition for review within 60 days of that date.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1999